No. 13,005

IN THE

United States Court of Appeals

For the Ninth Circuit

MINER LII and ALICE LII,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLEE.

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STATEMENT OF JURISDICTION.

By indictment returned March 14, 1951, Appellants were charged with violating Section 2421, Title 18, United States Code, within the jurisdiction of the District Court of Hawaii. The District Court of Hawaii had jurisdiction of that offense. Section 3237, Title 18, United States Code provides as follows:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any

district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves. June 25, 1948, c. 645, 62 Stat. 826.

Thus it is apparent that a violation of Section 2421, Title 18, United States Code is a continuing offense. Appellants contend that the District Court of Hawaii did not have jurisdiction in view of Rule 18 of the Federal Rules of Criminal Procedure. Under the notes of the Advisory Committee on Rules, cited immediately following the statement of the rule, the following language is found:

2. Within the framework of the foregoing constitutional provisions and the provisions of the general statute, 28 U.S.C.A. former § 114, supra, numerous statutes have been enacted to regulate the venue of criminal proceedings, particularly in respect to continuing offenses and offenses consisting of several transactions occurring in different districts. Armour Packing Co. v. United States, 28 S.Ct. 428, 209 U.S. 56, 73-77, 52 L.Ed. 681; United States v. Johnson, 65 S.Ct. 249, 323 U.S. 273, 89 L.Ed. 236. These special venue provisions are not affected by the rule. Among these statutes are the following: U.S.C.A. Title 8: * * *

§ 401 (White Slave traffic; jurisdiction of prosecutions).

Former Section 401, Title 18 is now incorporated under Section 2421 which is the section under which these defendants stand convicted. In any event this Court has held, in *Rodd v. United States,* 165 F. (2d) 54 (C.C.A. California), that a question of venue, if not raised until appeal, comes too late, and no mention of lack of jurisdiction of the trial Court was made until this case got into the Appellate Court. The jurisdiction of this Court to review the final judgment of the District Court is sustained by Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE.

The indictment charged that on or about the 9th day of October, 1950, the defendants did knowingly, wilfully, unlawfully and feloniously procure and obtain a ticket from the Pan American World Airways to be used by one Sarah Lee Wright, in interstate commerce from San Francisco, California to the City and County of Honolulu for the purpose of prostitution, debauchery and other immoral purposes and that thereafter the said ticket was used by the said Sarah Lee Wright, in interstate commerce from San Francisco, California to the City and County of Honolulu for the said purposes of prostitution, debauchery and other immoral purposes. (R. 3.) The defendants were tried jointly and convicted.

The Government proved by Sarah Lee Wright that she first met the defendants in October, 1950 in San Francisco (R. 34), that they then propositioned her

about going to Honolulu (R. 35-36), to work as a prostitute. (R. 36.) That after several conversations with both defendants she agreed to come to Honolulu. (R. 38.) That the defendant, Alice Lii, called the Pan American World Airways and made three (3) reservations. (R. 40.) That the defendant, Miner Lii, said that he would pay her way. (R. 41.) That they left the following Monday (R. 41), and came to Honolulu; that she worked as a prostitute in the defendants' house for seven (7) weeks after arriving here. (R. 42-45.) On cross-examination her story was not shaken.

Edward George Velazques, on behalf of the plaintiff, testified that he was a senior cashier for Pan American World Airways in San Francisco (R. 97); that on October 7, 1950, two Pan American airline tickets, bearing consecutive serial numbers, were made out, one to Miner and Alice Lii and the other to Sarah Lee Wright. (R. 99.)

Frank Sampson, a merchant seaman, testified on behalf of the plaintiff that on October 7, 1950 he took the defendants, Alice and Miner Lii, together with Sarah Lee Wright and a "girl named Mary", to the airport. (R. 106.)

Defendants' counsel moved for a directed verdict of not guilty as to Miner Lii which was overruled by the Court.

ARGUMENT.

Thirteen specifications of error are alleged by appellants. These specifications will be dealt with separately.

SPECIFICATION OF ERROR NO. 1.

THE COURT DID NOT ERR IN OVERRULING DEFENDANTS' OBJECTION TO TRIAL BY A JURY PANEL IN FRONT OF WHICH THEY HAD BEEN FOUND GUILTY OF CONTEMPT, FINED, AND PLACED IN CUSTODY OF THE UNITED STATES MARSHAL.

The record shows that the defendants were "practically an hour" late in appearing in Court on the morning of trial. (R. 26.) The Court found each defendant in contempt and fined each defendant $50.00 with the direction that the defendants be placed in the custody of the United State Marshal until the fine was paid. (R. 26.) This was before the jury was impaneled. (R. 27.) The record is silent as to whether any of the jurors ultimately chosen to serve were present in the courtroom. It is true that Mr. Soares, appellants' attorney, stated to the Court that the incident happened in the presence of the jury (R. 27), but there is no way of knowing if the jurors finally selected were in the courtroom at that time. If so, Mr. Soares could have questioned the prospective jurors as to their understanding of the incident on *voir dire* examination. In any event, before any proof at all was introduced, and before an opening statement was made by the plaintiff, the Court cautioned the jury in the following words:

> Now, you are trying these defendants for just what they are indicted for in this case, and nothing else. What their conduct may have been in other affairs is of no concern to you in trying this case. You were present when the Court had been aggrieved by the failure to be here at the time set for trial and the Court found them in contempt, guilty of contempt, and punished them. That is of no consideration to you gentlemen at all. It doesn't enter into this trial of this case in any respect whatsoever. In your minds it should not. (R. 28.)

If the actions of the judge, in fining defendants, was improper in any sense (which we do not concede) any error was certainly cured by his later instructions to the jury as heretofore quoted. The law, as stated in 23 *C.J.S.* at page 339 is as follows:

> If the judge makes an improper remark in the presence of the jury, it is ordinarily competent for him, in the absence of an objection, to correct it afterward by a proper instruction to the jury not to consider it, or by an instruction correcting the erroneous statement, except where the remark so prejudices the minds of the jury against accused or destroys a substantial defense, as to be ineradicable, or where the form in which the withdrawal is couched reiterates and aggravates the erroneous remark or conduct.

It was held in *Goldstein v. United States,* 63 F. (2d) 609 (1933-8 C.C.A.) that an Appellate Court should be slow to reverse a case for the alleged misconduct of the trial Court, unless it appears that the conduct was intended to disparage the defendant in

the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits.

There is certainly no showing that the Court intended or calculated that his remarks would prejudice the jury, and in any event, his later caution to the jury, after it was impaneled, would clear up any misunderstanding on their part.

SPECIFICATION OF ERROR NO. 2.

THE COURT DID NOT ERR IN ADMITTING EVIDENCE OF THE ACTIONS OF THE PROSECUTRIX AND OF THE DEFENDANTS AFTER THEIR ARRIVAL IN HONOLULU SUBSEQUENT TO THE CRIME ALLEGED IN THE INDICTMENT.

We submit that the question of whether or not the trial Court had jurisdiction has been settled by the authorities quoted in the "Statement of Jurisdiction" in this brief. Appellants now apparently contend that any evidence showing acts of either prosecutrix or defendants after their arrival in Honolulu, is immaterial, specifically, whether or not prosecutrix engaged in prostitution at the defendants' home after her arrival in Honolulu.

We quote from *United States v. Sorrentino,* 78 Fed. Sup. 425 (1948—M.D. Pa.), affirmed 175 F. (2d) 721, *certiorari* denied 70 S.Ct. 143, 338 U.S. 868, rehearing denied 70 S.Ct. 328, 338 U.S. 896:

> We admitted evidence of the conduct of Sorrentino after arrival of the victim in Buffalo. The gist or gravamen of the offense was the interstate transportation and inducing the victim to go into interstate commerce for the purpose

> of prostitution. The offense is complete the moment the victim has been transported across state lines with the immoral purpose or intent in the minds of the persons responsible. Mortensen v. United States, 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331; Wilson v. United States, Neff v. United States, supra. In considering the evidence however and in reaching their conclusion the jury were entitled to consider what the victim and Sorrentino did after she arrived at her destination, as well as the character of the house to which the victim had been brought as tending to prove the intent and purpose of defendant in bringing her there. See Pine v. United States, 5 Cir., 1943, 135 F. 2d 353, 357; Kelly v. United States, 9 Cir., 1924, 297 F. 212, 213; Wilson v. United States, Tedesco v. United States, 118 F. 2d 737 (9 C.C.A.).

It will be noted that one of the cases cited as upholding this theory is a case decided by this Court in 1941, the *Tedesco* case. When the *Sorrentino* case reached the Third Circuit Court of Appeals, 175 F. (2d) 721 (which affirmed the lower Court), apparently the question of introduction of evidence concerning acts subsequent to the offense was not strongly relied upon since that Court did not comment upon the question other than to say that they have carefully considered other contentions raised by appellant and "find them so wholly lacking in merit as to require no detailed discussion".

The same question has been also passed upon by this Court in the case of *Kelly v. United States,* 297 Fed. 212. This was a white slave case involving

the transportation of two women from Seattle, Washington to Anchorage, Alaska for the purposes of prostitution. The Court held as follows:

> * * * The burden was upon the government to prove that the two women were transported from the state of Washington to the territory of Alaska for the purpose of prostitution or debauchery, or for some other immoral purpose, and testimony tending to show the acts and conduct of the parties concerned after the arrival of the women at Anchorage was clearly competent to that end, and, as already stated, if competent, the testimony was ample to support the verdict. Athanasaw v. United States, 227 U.S. 326, 33 Sup. Ct. 285, 57 L.Ed. 528, Ann Cas. 1913 E, 911; Suslak v. United States, 213 Fed. 913, 130 C.C.A. 391; Beyer v. United States, 251 Fed. 39, 163 C.C.A. 289; Blackstock v. United States, (C.C.A.) 261 Fed. 150; Carey v. United States, (C.C.A.) 265 Fed. 515; Elrod v. United States, (C.C.A.) 266 Fed. 55.

It is significant to note that appellants' brief cites no cases holding contrary to the aforementioned authorities. The case of *Cholakos v. United States,* 2 F. (2d) 447, does not pass on the question involved here at all. It merely holds that where a person is charged with transporting a woman in interstate commerce for the purpose of prostitution, so long as the *intent* to so transport her is present, it is immaterial if the actual prostitution later occurs.

SPECIFICATION OF ERROR NO. 3.

THE COURT DID NOT ERR IN PERMITTING, OVER OBJECTION, LEADING QUESTIONS TO THE PREJUDICE OF THE APPELLANTS' RIGHT TO A FAIR TRIAL.

The appellants make the general objection that on direct examination, Sarah Lee Wright, the prosecuting witness, was asked leading questions. Appellants cite four instances of what they contend are leading questions. In the first instance (R. 37) the question was interrupted by appellants' counsel before it was completed. The question in its final form was in the following words:

> "Well, now, can you tell from there on what arrangement was made, if any?"

The second instance (R. 40) the question was:

> "Could you overhear the conversation, Miss Wright?"

The third instance (R. 43) was:

> "Was that one of the conditions that was attached to your coming out here?"

The last question objected to (R. 203) was:

> "Could you leave there by yourself?"

We submit that these questions, considering the context within which they were asked, are not leading, or at any rate are certainly not leading to the extent of being prejudicial to the defendants. The authority cited by appellants admits that the allowance of leading questions on direct examination is within the discretion of the trial judge. It is evident that the judge, by overruling objections to the fore-

going questions certainly did not consider them leading or prejudicial. The law on this subject, as stated in 70 C.J. Section 678, is as follows:

> The term "leading," as relative to a leading question, is a relative and not an absolute term. In general a question is leading when it is so framed as to suggest to the witness the answer which is desired of him, code provisions sometimes so providing; e converso a question not suggesting the desired answer is not leading, where it inquires only into a single fact. Merely mentioning or directing attention of the witness to the matter as to which information is desired, or the nature thereof, does not render the question leading as suggesting the answer, and this is true of a case where something of detail is included in the question in order to bring the matter to the attention of the witness.
>
> It is within the discretion of the trial court to determine whether questions on examination are leading and suggestive.

SPECIFICATION OF ERROR NO. 5.

THE COURT DID NOT ERR IN PERMITTING THE PROSECUTRIX TO REMAIN IN THE COURT WHILE APPELLANTS MADE AN OFFER OF PROOF TO BE ELICITED ON CROSS-EXAMINATION OF THE PROSECUTRIX.

Again we have an alleged error assigned by appellants in which the appellants' authority cited in support of the alleged error admits that the action of the trial Court is within its discretion (23 *C.J.S.* Section 1011).

> The trial court has authority to exempt particular witnesses from the operation of the rule or order for exclusion or sequestration. The question as to what witnesses may be exempted is largely a matter within the discretion of the court, and, even after the granting of the rule or order excluding or sequestering the witnesses, it is within the discretion of the trial court to permit some of them to remain in the court room and afterward to testify if the circumstances require it. * * *
>
> The court may, in the exercise of a sound discretion, permit the prosecuting witness or the person aggrieved or injured to remain in the court room, but, according to some cases, the court should impose as a condition that the state, if it desires to use the prosecutor as a witness, should examine him first. * * *

It has been expressly held on this question that permitting a witness to be present from time to time as offers of testimony implicating him were made was proper notwithstanding an order excluding witnesses. *State v. Kneeskern,* 210 N.W. 465, 203 Iowa, 929.

SPECIFICATION OF ERROR NO. 6.

THE COURT DID NOT LIMIT THE SCOPE AND EXTENT OF THE CROSS-EXAMINATION OF THE PROSECUTRIX OR UNFAIRLY AND UNFAVORABLY AND PREJUDICIALLY CHARACTERIZE THE CROSS-EXAMINATION.

A complaint is made as to certain remarks of the Court with reference to cross-examination of the prosecutrix by appellants' counsel. The remarks of

the Court complained of are set out in appellants' Specification of Error No. 6.

In *Goldstein v. United States,* 63 F. (2d) 609, the trial Court made, among others, the following remarks to defense counsel:

> "It would be hearsay. You know it is not competent. You must stop that. I am not going to stand for it much longer."
>
> * * * * * * *
>
> "That is twice, now, that I have passed on similar matters. I hope I do not have to pass on them a third time."
>
> * * * * * * *
>
> "You cannot take witnesses and put a ring in their noses and lead them around like pet bears."
>
> "It is not only hearsay * * * but worse than hearsay, and it is getting inferentially the testimony by men who are scattered all over the country, which you cannot do. I am quite sure you knew it could not be done."

The Eighth Circuit Court of Appeals, in passing on these remarks held as follows:

> It is not always possible during the trial of a hotly contested case for a judge, however impartial he may be, to maintain in the courtroom that atmosphere of complete judicial calm which is so much to be desired. We must not overlook the fact that the human element cannot be entirely eliminated from the trial of lawsuits. While counsel owe to the court, because of the position which he occupies, the utmost deference and respect, and while the court owes to them an equal obligation of courtesy and patience and considera-

> tion, nevertheless sharp differences of opinion do arise in the heat of trial and things are said which were better left unsaid. Such incidents are often regarded as trivial during the trial of a case and are quickly lost sight of, but, when set forth in the record and emphasized by counsel on appeal, they take on an importance which they never actually possessed. It is impossible to gather from the cold record, particularly when it is in narrative form, the atmosphere of the trial itself, the manner in which the words were spoken, or the probable effect, if any, which they had upon the merits of the controversy. Critical remarks of the court frequently cut both ways, if they cut at all. Colloquies between counsel and colloquies between the court and counsel as to the rules of evidence are not ordinarily regarded by a jury as serious matters or of much concern to them. * * *

We are quoting in the appendix another excerpt from *Goldstein v. United States,* supra, which sets out other remarks made by trial Courts which have been held to be not prejudicial. All the remarks cited in the appendix were more extreme than the ones uttered by the trial Court in this case, which, we submit, were not prejudicial to the defendants.

The cross-examination of Sara Lee Wright, the prosecutrix, was not limited to even the slightest extent.

Appellants' objection that the cross-examination was so limited is restated in Specification of Error No. 7 and will be dealt with there.

SPECIFICATION OF ERROR NO. 7.

THE COURT DID NOT LIMIT APPELLANTS' CROSS-EXAMINATION OF A GOVERNMENT WITNESS TO FULLY INQUIRE INTO THE CHARACTER OF CRIMINAL ACTIVITIES OF SAID WITNESS.

As far as the remarks of the Court are concerned they have been dealt with in the preceding specification of error. Appellants now contend that they were limited in their cross-examination by reason of the fact that the Court said, "I don't feel that it would be proper to give you any more than ten minutes additional time to finish your cross-examination." In point of fact, appellants' cross-examination of the prosecuting witness was not limited in the slightest particular as appellants' counsel was allowed full latitude and scope in completing his cross-examination. The printed record shows that the cross-examination of the prosecuting witness covers eleven printed pages following the remarks of the Court. Upon the completion of the cross-examination appellants' counsel stated, "No further questions." If appellants' counsel felt that he had been limited in any extent on cross-examination, he could have re-stated to the Court his desire to continue. The Court, of course, made no further references to the subject after the first one to the effect that he did not think it would be proper to continue for more than ten minutes on cross-examination. Nowhere in the record does it appear that the trial Court directed appellants' counsel to conclude his examination on any subject.

Appellants have not shown that they have been prejudiced by any ruling of the Court with reference

to cross-examination. This Court has held in *Allred v. United States,* 146 F. (2d) 193 (1944) that unless such prejudicial conduct is shown, the judgment will not be reversed.

SPECIFICATION OF ERROR NO. 8.

THE COURT DID NOT ERR IN OVERRULING APPELLANTS' MOTION FOR DIRECTED VERDICT AS TO DEFENDANT, MINER LII.

At the conclusion of the plaintiff's case a motion for a directed verdict of acquittal was made as to only one defendant, Miner Lii, which motion was overruled by the Court.

> On review from an order denying a motion for a directed verdict of acquittal or for a judgment as of non-suit or overruling a demurrer to the evidence, the appellate court will not weigh the evidence, and will not disturb the ruling of the trial court if there was sufficient evidence to require the submission of the cause to jury. 24 C.J.S. 1880.

We submit that the following evidence was adduced against the defendant, Miner Lii:

1. Sarah Lee Wright met Miner Lii and his wife in San Francisco in October of 1950. (R. 34.)

2. She was introduced to Miner Lii by Frank Sampson. (R. 88.)

3. She was told that he was looking for girls to come to Honolulu. (R. 89.)

4. She talked to both defendants in a car. (R. 35.)

5. Both defendants propositioned her to come to Honolulu. (R. 35.)

6. They asked her to work here as a prostitute. (R. 36.)

7. They described to her the conditions here, told her they had a house over here where she could work, told her that she would stay there and eat there and that they would take half the money, and told her what the price was. (R. 36 and 90.)

8. They again asked if Sarah Lee Wright would come to Honolulu and both of them knew that she was coming and both of them were present at this conversation. (R. 38.)

9. Defendant, Miner Lii, said that he would pay her way and did. (R. 41.)

10. She came to Honolulu with both defendants, worked as a prostitute in defendants' house, and half the money went to them. (R. 42-43.)

The foregoing evidence was viewed by the Court as sufficient proof to require submission of the cause to the jury. The jury considered this evidence as sufficient proof to convict the defendant, Miner Lii. Under the circumstances, certainly it could not be said that a motion for a directed verdict of acquittal should have been granted.

SPECIFICATION OF ERROR NO. 9.

THE COURT DID NOT ERR IN REFUSING APPELLANTS' OFFER OF PROOF AS TO CORROBORATING TESTIMONY OF APPELLANTS' WITNESS.

The appellants offered a witness, one Harold John Lewis, who testified that he had seen Sarah Lee Wright on the Island of Kauai, which was denied by Sarah Lee Wright. (R. 313.) Appellants then offered the proof that the witness, Lewis, had talked to some man named Cluny in Honolulu on a later date and that Cluny had known Sarah Lee Wright and that Cluny had produced photographs of the said Sarah Lee Wright in an effort to show Lewis that the girl Cluny knew was the same girl. Appellants offered to prove the conversations between Cluny and the witness Lewis. Naturally this offer of proof was denied, as a mere cursory examination of the offer (R. 139), shows it to be based on nothing other than hearsay. We see no reason for elaborating on this specification of error as the offer of proof shown in the record speaks for itself, and shows clearly that the Court was justified in refusing to admit that proof.

SPECIFICATION OF ERROR NO. 10.

THE COURT DID NOT ERR IN PERMITTING CROSS-EXAMINATION OF DEFENDANT ALICE LII ON MATTERS NOT REFERRED TO IN HER DIRECT TESTIMONY.

The question is too well settled to admit of argument that a wide scope is allowed on cross-examination. *Wharton's Criminal Evidence*, Vol. 3 at page 2165 states the rule to be as follows:

> Opportunity should be allowed for a thorough and sifting cross-examination which should be neither unduly restricted nor abridged. The denial of a fair latitude in cross-examination is a denial of a substantial right and a withdrawal of one of the safeguards essential to a fair trial. It is, therefore, generally held that a wide range of cross-examination is permissible and that wide or great latitude is allowed, especially in capital cases. The court should never interpose except where there is a manifest abuse of that right, but should extend rather than restrict the right of cross-examination as to facts in issue or relevant to the issue.

Further, the extent of the cross-examination is within the control of the trial judge. 70 *C.J.S.* at page 682:

> The scope and extent of the cross-examination of a witness, including own witness who has proved hostile, and method and manner in which it may be conducted, are matters resting largely in the discretion of trial court, whose rulings will not be disturbed unless some abuse of discretion is shown, or the right to cross-examine denied, but in the absence of a contrary showing, the presumption is that there was no abuse of discretion, in permitting or excluding the cross-examination, nor can such abuse be predicated on a ruling from which no injury has resulted. * * *

The questions asked the defendant, Alice Lii, on cross-examination, were clearly within the scope of cross-examination and properly admitted by the trial judge. With reference to the ownership of certain

automobile, it appears that the defendant, Alice Lii, had not worked for four years and her husband had not worked for ten years, and surely it should be of some probative value to the jury to know the conditions under which the defendants live. All questions complained of in this Specification of Error, No. 10, were clearly within the scope of cross-examination as allowed by the Court.

SPECIFICATION OF ERROR NO. 11.

THE COURT DID NOT PERMIT IMPROPER QUESTIONS OF WITNESSES CALLED ON REBUTTAL.

It is clear that subject to the discretion of the trial Court either side has the right in a criminal prosecution to introduce evidence in rebuttal to that introduced against him by the other side. 23 *C.J.S.* at page 450:

> * * * Hence, while it is discretionary with the prosecution whether it will introduce any evidence in rebuttal, if it decides so to do it may introduce in rebuttal any competent evidence which explains or is a direct reply to or a contradiction of material evidence introduced by accused, or which is brought out on his cross-examination, or on cross-examination of his accomplice, or other defense witnesses, or even state witnesses, and accused may, and should be permitted to, introduce competent evidence in rebuttal of that introduced by the prosecution.

Alice Lii, on direct examination, specifically denied that Sarah Lee Wright ever practiced prostitution in

her home or that she received any money from the said prostitution. She denied that the matter of prostitution was ever discussed. (R. 161-166.) Therefore, it was perfectly proper for the Court to allow the prosecution to prove by the witness, Sarah Lee Wright, exactly what took place in the Liis' home while she was there.

Alice Lii denied on direct examination that she bought the car referred to in the evidence. Therefore, it was perfectly proper for the Court to allow the prosecution to prove by the car salesman that he received the cashiers' checks from Alice Lii.

SPECIFICATION OF ERROR NO. 12.

THE COURT DID NOT ERR IN PERMITTING A RECESS AT THE REQUEST OF THE PROSECUTION AND IN REFUSING A CONTINUANCE AT THE REQUEST OF THE DEFENSE IN ORDER TO SECURE A WITNESS.

The prosecution requested a recess in order to secure three witnesses who were under subpoena. The Court recessed at 10:23 A.M. until 1:30 P.M. on the same day. (R. 231.) This is referred to in appellants' brief as a continuance, but it is perfectly apparent that it is a recess. Appellants then requested a continuance for a week to secure a witness who was not under subpoena (R. 229 and 272), but whom the appellants could have subpoenaed before the trial, as appellants' counsel, in his opening argument, stated that he expected to have that witness present. (R. 32.) There is no showing that the witness' testimony would be material. There is no showing that appellants'

counsel was not guilty of neglect or *laches* in securing a subpoena for the witness. There is no showing that this witness could be procured within a week. Certainly there is no showing that there was an abuse of discretion on the part of the trial Court in refusing the continuance.

SPECIFICATION OF ERROR NO. 13.

THE COURT DID NOT ERR IN PERMITTING THE REBUTTAL EVIDENCE OF THE WITNESS LORAINE STAUNTON.

Alice Lii, on cross-examination, stated that the name Loraine Staunton sounded familiar to her but that she did not remember that Loraine Staunton ever stayed at her house. (R. 172.) Later in her testimony she said, with reference to Loraine Staunton, "Well, I know no one there by that name was staying at my house." (R. 185.) Alice Lii stated that no girls had ever stayed at her house except Sarah Lee Wright and Mary Chang. (R. 171.) In view of that testimony it clearly is competent to prove that the said Loraine Staunton, whom Alice Lii "couldn't remember", stayed at the Liis' house and practiced prostitution. This evidence would not have been competent as evidence in chief but to impeach Alice Lii's credibility, it was clearly competent and extremely material.

CONCLUSION.

We respectfully submit that there are no errors charged by appellants upon which this verdict should be set aside.

Dated: Honolulu, T.H., this 14th day of January, 1952.

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(Appendix Follows.)

Appendix.

Appendix

GOLDSTEIN v. UNITED STATES, 63 F. (2d) 609.

Gridley v. United States, (C.C.A. 6), 44 F. (2d) 716, 736.

Myers v. Town of Guntersville, 21 Ala. App. 559, 110 So. 52, where the remark was:

> "You have asked that enough; you just want to drag them around from first one thing to another."

People v. Connors, 77 Cal. App. 438, 246 P. 1072, 1079, where the Court had said:

> "Make your object; don't take up so much time in statements."

People v. Knocke, 94 Cal. App. 55, 270 P. 468, 470, where the remarks complained of were:

> "I am surprised that any one who has gotten by the Bar Association examination should raise that question"; and
>
> "Now, wait. If you cannot behave yourself in this court, you better go and practice in the police court. Make your motion in a quiet manner".

Of these remarks, the Appellate Court said:

> "Under the strain of a trial and the repetition of an offense, even trial judges are not always able to choose their diction with the nicety of a Field or Marshall".

People v. Lockhard, 242 Mich. 491, 219 N.W. 724, 725, in which the objectionable remark was:

"I am glad to have you make objections, if there is some good sense back of them, if they are proper objections. You are a lawyer; you know what impeachment is; you ought to know it by this time".

In *Hein v. Mildebrandt,* 134 Wis. 582, 115 N.W. 121, 124, the Supreme Court of Wisconsin said:

"The language complained of was an admonition coming from the court to the effect that after the court had ruled twice with reference to a certain question it was unprofessional and uncourteous for appellant's counsel to persist in putting the question for the purpose of procuring an answer considered improper by the court, and that counsel had the record covering the point completely, and that he must not offend in that way again".